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NIXON & VANDERHYE, PC			SZEKELY, PETER A	
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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/587,267

Filing Date: July 26, 2006

Appellant(s): JANSSEN, ROBERT HENDRIK CATHARINA

Bryan H. Davidson
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 9/8/09 appealing from the Office action
mailed 4/6/09.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

5,684,071	Mogami et al.	11-1997
5,770,644	Yamamoto et al.	6-1998

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JP-09-143346	Saiki et al.	6-1997
JP-11-080519	Yoshihara et al.	3-1999
JP-2003-076088	Tanaka et al.	3-2003

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 1-13 are rejected under 35 U.S.C. 103(a) as being unpatentable over

Mogami et al. 5,684,071, Yamamoto et al. 5,770,644, Saiki et al. JP -09-143346,

Yoshihara et al. JP-11-080519 or Tanaka et al. JP-2003-076088.

Mogami et al. disclose in claim 9, a (A) thermoplastic polyester, (B) 2-50% by weight of a heterocyclic compound based on the polyester, (C) 0.1-50% by weight of a compound having at least two functional group based on component (B) and (D) 0-50% by weight of a phosphorus based flame-retarder based on said polyester (A).

Component (B) is identified in claim 12 as melamine cyanurate and the polyester is identified in claim 16 as polyethylene terephthalate. Column 11, line 15 shows that the polyester can be polybutylene terephthalate. 50% by weight based on the polyester means 66.66% by weight polyester and 33.33% by weight melamine cyanurate. The other two components are "other additives" which can total 0.1% by weight based on component (B). Yamamoto et al. teach 95-30 parts by weight of polyester, 5-70 parts of polyphenylene ether (other polymer), 0.05-10 parts of compatibilizing agent (which can be a phosphorus trimester according to claim 2), 2-45 parts of phosphoric ester, 0-150 parts of filler, 0.001-15 parts of anti-dripping agent (which can be a fluorine containing polymer according to claim 5), 0-45 parts of melamine cyanurate and 0-15 parts of

polystyrene in claim 1. The polyester can be polybutylene terephthalate (column 15, lines 27-30). Saiki et al. display 100 parts of polybutylene terephthalate with 1-100 parts ammonium sulfate (other additive) and 1-100 parts of melamine compound which can be melamine cyanurate (Abstract). Yoshihara et al. reveal 100 parts of modified polyalkylene terephthalate, 0-150 parts of unmodified polyalkylene terephthalate and/or polycarbonate and 0-75 parts of melamine cyanurate (Abstract). Tanaka et al. recite 60-85 weight % polyester and 15-40 weight % melamine cyanurate (Abstract). It would have been obvious to one having ordinary skill in the art, at the time the invention was made to select melamine cyanurate from a list of equivalents in sufficient concentrations to yield a flame-retardant polyester composition.

(10) Response to Argument

Applicants' arguments filed 7/6/09 have been fully considered but they are not persuasive. Yamamoto et al. disclose up to 45 parts of melamine cyanurate to go with the 30-95 parts of polyester. A reference disclosing optional inclusion of a particular component teaches compositions that both do and do not contain that component. See Usher-Smith Labs. v. Pamlab LLC, 75 USPQ2d 1213, 1215 (Fed. Cir. 2005). A reference is not limited to its illustrative examples or preferred embodiments. See In re Fracalossi, 215USPQ 569-570 (CCPA 1982); In re Mills, 176 USPQ 196 (CCPA 1972); In re Lamberti, 192 USPQ 278, 280 (CCPA 1976); Merck & Co. v. Biocraft Labs. Inc., 10 USPQ2d 1846 Fed. Cir. 1989). The 2.05 parts of phosphate in claim 1 is sufficiently close to the "less than 2 wt. %" claimed by applicants to make it obvious to one of ordinary skill in the art. See Titanium Metals Corp. of America v. Banner, 227 USPQ

773 (Fed. Cir. 1985). Mogami et al. teach 2-50 wt. % heterocyclic compound (melamine cyanurate) based on the polyester. That means 66.66 wt. % polyester and 33.33 wt. % melamine cyanurate at the high end of the melamine cyanurate concentration range. In the case where the claimed ranges overlap or lie inside ranges disclosed by the prior art a *prima facie* case of obviousness exists. See *In re Wertheim*, 191 USPQ 90 (CCPA 1976); *In re Woodruff*, 16 USPQ2d 1934 (Fed. Cir. 1990). The claims of Mogami et al. do not require glass fibers and minimum amount of phosphorus compound claimed is zero percent. Again, references must be considered for all they disclose and must not be limited to their preferred embodiments or working examples. Tanaka et al. recite "containing 15-40 wt. % of melamine cyanurate to the whole weight" which defines the amount of polyester as 60-85 wt. %. The Abstract of Yoshihara et al. shows no additives at all. Saiki et al. display 100 parts of polyester, 1-100 parts of ammonium sulfate and 1-100 parts of melamine cyanurate. These amounts are quite specific and overlap applicants' claimed range. As far as the picking and choosing is concerned in the context of an obviousness rejection, [see *In re Arkley*, 172 USPQ 526 (CCPA 1972)] the examiner did not pick words or phrases from one prior art reference and combined it with another. All cited references contain all the claimed ingredients and the "picking and choosing" is limited to selecting the concentrations which are reading on applicants' claims.

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Peter Szekely/

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